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April 2, 2001

RE: V010003
Comments Regarding Retail Electricity Competition

The National Alliance for Fair Competition (NAFC) is pleased to respond to Federal Trade Commission's request for comments regarding retail electricity competition. We appreciate the Commission's previous actions, especially its *July 2000 Staff Report: Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform,* and its continuing efforts to identify areas in which additional federal legislative or regulatory action may be desirable.

NAFC and its members are primarily concerned with those aspects of emerging electric competition regarding affiliate transactions and their potential for abuse and unfair competitive behavior. Specifically, we are concerned with the potential inadequacy of state and federal regulatory efforts to address cross-subsidization and/or cost shifting, discriminatory conduct which favors utility affiliates at the expense of both ratepayers and competition, and structural separation. It is to these concerns which NAFC will direct these comments.

INTRODUCTION

The National Alliance For Fair Competition (NAFC) is a Washington, D.C., based coalition composed of national trade associations.. As an attribute of association membership, those individual firms which comprise the make-up of the individual participating associations within NAFC are also represented under the umbrella of the National Alliance. NAFC organizations include: Associated Builders and Contractors, National Electrical Contractors Association, Sheet Metal and Air Conditioning Contractors National Association, National Association of Plumbing, Heating and Cooling Contractors, Petroleum Marketing Association of America, Air Conditioning Contractors of America, Mechanical Contractors Association of America, and the Independent Electrical Contractors.

Taken together, these member organizations represent over 25,000 individual firms throughout the United States. The organizations which comprise NAFC consist, overwhelmingly, of small, private sector businesses engaged in the design, supply, rental, sale, installation and servicing of electrical and mechanical products, energy efficiency equipment, retrofits, and systems, as well as providing energy fuels. While a few larger firms are included within this group, the majority of business are small by any standard of measurement and many are family owned and operated. These firms compete directly with regulated utilities and their unregulated affiliates for customers and contracts in residential, commercial, institutional, and industrial markets for energy services. Such markets have been directly impacted by restructuring and deregulation efforts in almost every state. NAFC's members have participated in legislative and regulatory actions in numerous states which have deregulated their electric utility industries.

BACKGROUND

As the Commission is aware, the electric power industry is in the process of transition from a predominantly monopolistic, regulated environment to one characterized by increased competition and decreased regulation. Portions of the industry, e.g., distribution and transmission, will continue to be regulated while generation and other aspects will be unbundled and enter the competitive marketplace. The persistence of regulated monopolies in the electric power industry stands in stark contrast to deregulation efforts in other industries which have resulted in a complete transition to the competitive, private sector. It is the resulting bifurcated nature of the industry, permitting a single entity to operate in both competitive and regulated environments, which creates the problems which the FTC, state regulators, and impacted non-affiliated competitors desire to be addressed.

The climate of deregulation, if not its actual occurrence, has prompted utilities to form unregulated affiliates and subsidiaries seeking to capture markets which have not traditionally been served by utilities and which lie, generally, outside the scope of their core functions. Numerous utilities have settled on entry into the energy services and related markets as a means of retaining customers and establishing new profit centers. This diversification by utilities into areas outside of their publicly regulated role as producers and suppliers of energy has occasioned significant and continuing harm to those small, private sector firms which have traditionally engaged in such energy related service fields.

In residential and light commercial markets, utilities (typically through unregulated affiliates or subsidiaries) now routinely sell appliances, provide plumbing, heating, and air conditioning equipment and service contracts, engage in insulation work and sales of storm windows and doors, provide outdoor lighting and interior lighting fixtures.

In larger commercial, institutional, and industrial markets, utility entry has focused on facility energy management, sale, design and installation and maintenance of HVAC and electrical systems on a corporate basis (covering multiple sites for an entire corporate entity, such as McDonald's) or, in an institutional setting, multiple sites in a school district. In such instances, energy services frequently bundle power purchasing with electric/mechanical work.

This competition engenders considerable friction between small private sector firms which have traditionally supplied such services and the utilities which can call on the considerable marketing advantages associated with monopoly power. Further, and most importantly, utilities may unfairly subsidize their market entry from their utility rate base. There is also considerable potential for small businesses to be denied access to newly emerging markets which are the key to future expansion, job growth, and profitability as deregulation progresses.

The primary concern for NAFC and its members is the ability of the utility to leverage its entry into, and penetration of, traditional competitive private sector markets (through its non-utility subsidiaries or affiliates) by means which are inherently unfair and injurious to competition and consumers. Such methods, such as cross-subsidization or cost shifting, prior acquisition of market power through legitimate operation as a public utility, the selective and discriminatory retention or dissemination of information acquired through regulated utility operations are methods of competition unavailable to business entities that do not enjoy a status as a state-sanctioned monopoly or an affiliate of such an entity.

It must be emphasized that the "unfairness" of such competition does not arise due to the utility's (or its subsidiary's or affiliate's) size, or due to any inherent advantage associated with corporate management, or with expertise in the field or relevant markets. Rather, the "unfairness" arises from two basic facts. First, the utility and its affiliated companies inhabit a mixed economic environment where certain operations are regulated while others exist in an unregulated, competitive market. This, despite regulatory oversight, produces the opportunities for cross-subsidization, cost shifting, and discriminatory conduct.

Second, by virtue of its status as a state franchised monopoly (in distribution and transmission for those states which have deregulated generation aspects of their electric power industry), the utility, to the exclusion of all others, enjoys a captive customer base in the tens, if not hundreds, of thousands of customer sites. This exclusive monopoly franchise provides a mechanism by which costs can be dispersed over this rate base and imparts an enormous reservoir of name recognition to the utility and its affiliates due to such monopoly status. This franchise also imparts an ability and a legal right to gather customer site information regarding energy use (and future energy marketing leads) including a complete profile of each customer with respect to billing and credit history. Unfortunately, state regulatory efforts frequently prove to be inadequate at preventing the transfer of such information to a utility's unregulated affiliate which may then use such information to directly target the customers of unaffiliated competing firms. Such informational transfers are both discriminatory, in that non-affiliated firms do not have access to such informational, as well as providing a substantial cross-subsidy in that valuable marketing data is supplied, usually at no cost to the unregulated affiliate.

None of these advantages is available to a private sector competitor, large or small, which is unaffiliated with a regulated public utility.

FOCUS OF COMMENTS

NAFC applauds the Commission for its previous efforts in delineating the deleterious effects of cross-subsidization, cost shifting, discriminatory conduct and other abuses which may arise in the context of deregulation and restructuring the electric power industry. On numerous occasions, the Commission has testified before state regulatory bodies on these subjects and, in general, NAFC agrees with the Commission's observations.

More specifically, NAFC agrees with the positions to which the Commission has testified and which, most recently, were reiterated in the Commission's *July 2000 Report* and which conclude that:

- "Functional unbundling stops short of structural separation and thus leaves in place the anticompetitive opportunities and the monitoring and enforcement difficulties that are inherent in vertical integration between regulated and unregulated markets. Operational unbundling is preferable to purely functional unbundling and that are inherent in vertical integration between regulated and unregulated markets...

  By separating ownership from control, operational unbundling captures a primary advantage of divestiture by affording a high level of assurance -- at least as high as functional unbundling, if not higher -- that nondiscriminatory practices and rates will prevail. Operational unbundling would not incur the costs of enforcing behavioral rules, because the firms would have less incentive and ability to discriminate. It should be at least as effective as functional unbundling in ensuring against discrimination, and it would be much less costly to implement than divestiture, because only operation, not ownership, would be structurally separated. "

- There are "...significant reservations about the effectiveness of relying exclusively on behavioral rules to discourage discrimination in transactions between regulated utilities and their unregulated affiliates."

- "There is a justifiable concern regarding the effects on consumers and competition of unrestricted use by unregulated affiliates of the logo of the regulated distribution firm. Harm to consumers and competition may occur if elements of the reputation of the regulated firm are not applicable to the unregulated affiliate, but consumers believe that they are applicable when the unregulated affiliate uses the parent utility's logo. For example, an element of a parent firm's reputation might be the credibility of its pledges of high-quality service that are backed by the parent's financial stability as a government-franchised monopoly. If a consumer imputed this same credibility to an affiliate's promises of high-quality service because of its use of the parent' logo, when in fact the affiliate did not have access to the revenues of the monopoly franchise, the consumer could be injured if the affiliate was unable to fulfill its promises in the way the consumer expected. Under such circumstances, the use of the logo by the unregulated affiliate could harm consumers and harm competition in much the same way as deceptive advertising."

In this last context, NAFC would go further and note that the use of a parent or affiliated utility's name and logo represents the transfer of a valuable intangible asset, i.e., goodwill, to the affiliate usually at no cost. Such a transaction represents a cross-subsidy to the extent that value has not been returned to the utility. In such instances consumers are doubly harmed in that such use foregoes certain revenues which could serve to lower or maintain rates at present levels while simultaneously being potentially deceptive.

Because NAFC agrees with these observation, it does not believe that it is necessary to convince the Commission as to the soundness of its position. Rather, NAFC will focus these comments on those areas in which it believes that the Commission, as well as state regulators, should address.

Scope of Coverage

First and foremost, the Commission itself has yet to extend the logic of its findings and observations to those markets served by NAFC members and other small businesses in impacted industries such as electrical and mechanical contracting. Although some states have acted to encompass those utility affiliates which compete in these markets within the scope of codes and regulations, too many have not.

NAFC and its members believe that codes and rules which govern affiliate practices should extend to all unregulated affiliates regardless of the type of competitive activity in which they are employed rather than just those engaged in competitive retail energy marketing of natural gas or electricity.

Excluding some utility affiliates from the coverage of a code while including others is both arbitrary and inimical to the interests of affected competitors and ratepayers alike. It is not the type of business in which an affiliate is engaged which should determine inclusion or exclusion from any code of conduct. It is the potential for ratepayer abuse and harm to competition which should control determinations to include or exclude such affiliates. The source or recipient of any subsidy is irrelevant. It is the present existence and the potential existence of such impermissible action which is relevant. Competition and consumers alike will be harmed from impermissible subsidies and cost shifting no matter from which source they emanate or which affiliate they benefit.

Neither is an inquiry into the number of firms presently engaged in competition for customers and work in the competitive market relevant to triggering coverage under any code. The presence of many or a just a few firms engaged in competition does not affect the existence or non-existence of impermissible conduct which may harm ratepayers or competition.

The issue one of *subsidized* competition. In such a situation a utility and it's affiliate may have *no* incentive to raise the artificially low prices charged in the unregulated market. Since the affiliate is subsidized through the transfer of assets to it at less than market costs (e.g., labor, customer site information, vehicles, tools, equipment), it is already in a position to maintain its artificially low prices indefinitely. The regulated entity, which has procured such assets with ratepayer funds and is able to pass them on in its regulated rates for monopoly service likewise has no incentive to eliminate such subsidies unless its impermissible conduct is discovered. Thus, it is only the likelihood of discovery and not the existence of, or entry of, competing firms which acts as an impediment to the continuing subsidization and the persistence of artificially low prices offered by the affiliate. As long as the probability of discovery is low, as it will be if coverage is not extended to all affiliates, and as long as the penalties for such conduct are tolerable as a cost of doing business, such subsidies will continue and new firms will be effectively barred from the market while existing ones are eliminated. In such circumstances, there is little likelihood that consumers or anyone else will ever see the benefits of competition.

If economies of scope an scale truly exist for a utility and its unregulated ventures, they would exist only as an attribute of affiliation with a cost of service regulated monopoly and its captive rate base. Since competitors cannot choose to affiliate with such entities, their ability to acquire similar efficiencies is unavailable. NAFC believes that, if this is the case, the appropriate public policy response should be to extend the scope of coverage of regulation (such as codes of conduct) to a utility's unregulated operations as well.

At this point, it is no longer questionable as to whether the entry of unregulated affiliates of public utilities have an impact on markets traditionally served by those small businesses in the related energy service industry. Ample evidence exists by which to show the inroads made in such markets by affiliated firms. The table below (covering approximately 18 months from January 1, 1999 to June 1, 2000), complied form various sources including news accounts and company press releases, indicates the success of such firms in capturing customers and markets from non-affiliated firms. [1]

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[1]. The large dollar amounts for contracts is due to the bundling of energy commodities with related energy efficiency work included in the contracts. From the information provided it is not possible to separate out each individual component. Further, since the sources are company press releases and news accounts, the accuracy of the contract amounts cannot be independently verified. Finally, such amounts may be predicated on estimated acts to occur in the future and should be considered speculative. Much of this information can be obtained from EnergyInfoSource at their website.

Date 1999	Service Provider	Customer	Product	Number of Sites	Length of Contract	Value of Contract
1/1	Cadence	Storage USA	Energy Information, Energy Efficiency	485		$-
1/1	Cadence	Service Merchandise	Energy Information, Energy Efficiency			$-
1/13	PG&E Energy Services	Los Angeles Unified School District	Air Conditioner Installation	150	2 year	$155,000,000
2/17	Sempra Energy Solutions	Lockheed Martin	Energy Efficiency and Water Conservation			$15,000,000
3/10	Enron Energy Services	Ocean Spray	Total Energy Management Services		10 years	$116,000,000
3/10	Enron Energy Services	Archdiocese of Chicago	Natural Gas, Energy Management	2,000	7 years	$246,000,000
3/28	Evantage	County of Fairfax, Virginia	Energy Efficiency	14		$2,300,000
4/28	Evantage	U.S. Army Medical Command Center	Energy Efficiency		25 years	$-
5/4	Carolina Power & Light	Sears	Energy Information, Energy Management	845		$-
6/22	Cadence	CKE (Hardee's, Taco Buno)	Energy Information, Energy Efficiency			$-
7/12	PG&E Energy Services	Marriott	Electricity, Energy Management	1,400	5 years	$165,000,000
7/13	Enron	Suiza Foods Corporation	Energy Management	50	10 years	$-
7/21	DukeSolutions	Toronto Dominion Centre	Energy Services, Energy Procurement			$19,000,000
7/22	PG&E Energy Services	Motel 6	Electricity, Energy Services	106	5 years	$-
8/11	Cadence	Blockbuster	Energy Information, Energy Efficiency			$-
8/11	Cadence	SUPERVALU	Energy Information, Energy Efficiency			$-
8/11	Cadence	Papa John's	Energy Information, Energy Efficiency			$-
8/11	Cadence	One Price Clothing Stores	Energy Information, Energy Efficiency	622		$-
8/11	Cadence	Carroll's Corp. (Burger King)	Energy Information, Energy Efficiency			$-
8/11	Cadence	Motel 6	Energy Information, Energy Efficiency			$-
8/18	DukeSolutions	Mitsubishi Motors Manufacturing of America	Energy Services	1	multi-year	$30,000,000
8/23	Avista Services	Hospitality Associates	Energy Management, Energy Efficiency	80	3 years	$-
9/1	ONSITE SYCOM Energy Corporation	Newark Public Schools and Johnson Controls, Inc.	Lighting	82		$10,500,000
9/2	DukeSolutions	NASA John H. Glenn Research Center	Energy Efficiency		7 years	$-
9/14	Con Edison Solutions	Brooklyn College	Energy Efficiency			$-
9/22	DukeSolutions	Veterans Affairs Medical Centers	Energy Efficiency	8	18 years	$28,000,000

9/23	Evantage	Halifax County Public Schools	Energy Efficiency	11	11 years	$1,300,000
10/4	CMS Marketing, Services and Trading	Bank One	Energy Management, Energy Procurement	3,200		$-
10/7	American Energy	John Q. Hammons Hotels	Energy Management	49		$-
10/12	Evantage	Fairfax County, VA	Energy Efficiency			$-
10/14	EUA Citizens Conservation Services	Richmond Redevelopment and Housing Authority	Energy Efficiency			$6,000,000
11/3	DPL	Isotec	Energy Reliability			$-
11/8	Dominion Resources	Washington Redskins	Energy Management		multi-year	$-
11/11	Energetix	City of Canandaigua	Energy Efficiency			$1,000,000
11/19	Reliant Energy Retail Group	Luby's Restaurants	Energy Management	226		$-
11/22	Energy Masters	U.S. Departments of Defense, Transportation, and Energy	Energy Efficiency	7		$10,000,000
12/1	New West Energy	California Oil Producers Electrical Cooperative	Electricity, Metering, Billing Services			$-
12/2	ONSITE SYCOM	City of San Diego	Energy Efficiency		12 years	$-
12/3	PEPCO Energy Services	Southern Management Corp.	Energy Management	63		$-
12/10	Energy Masters	U.S. Coast Guard	Energy Management			$-
12/22	DukeSolutions	CarrAmerica	Energy Management	326	5 years	$150,000,000
12/29	Cinergy Business Solutions	Terre Haute Housing Authority	Facility Renewal	256	1 year	$2,300,000
12/29	Cinergy Business Solutions	North Gibson School Corporation	Energy Efficiency		1 year	$1,700,000
1/3/00	EUA Cogenex	Textron Systems	Energy Management			$3,100,000
1/4	Enichem Energy	TrizecHahn	Energy Management	4		-$-
1/5	Ashland Energy Services	Honda of America Mfg.	Energy Management	1		-$-
1/17	AGRA Cogenex	DuPont Canada Inc.	Energy Efficiency			-$-
2/2	Enron Energy Services	Chase Manhattan Corporation	Energy Management		10 years	$ 750,000,000
2/23	Honeywell Home Building and Control	Fort Dix U.S. Army Reserve Installation	Energy Efficiency	118		$18,100,000
3/8	Américas Power Partners/Armstrong Service	Bates Troy Industrial Laundry	Facility Management			$2,500,000
3/10	Energy Assets	Jefferson Health System and Thomas Jefferson University	Energy Efficiency			-$-
3/15	Xenergy	Hanscom Air Force Base	Energy Efficiency		12 years	$12.000,000
3/16	Sempra Energy Services	Houston Astrodomain	District Heating and Cooling	2		$25,000,000
3/16	Vestar	New Albany - Floyd County Consolidated School Corporation	Energy Efficiency	3		$5,400,000
4/3	Sempra Energy Services	Premier Inc.	Energy Efficiency	1,800	3 years	$85,000,000
4/13	Enron Energy Services	Sonoco	Energy Management		6 years	$210,000,000
4/17	Reliant Energy Thermal Systems	Astrodomain Complex	Energy Management			-$-
4/20	Vestar	Ohio University	Energy Efficiency		10 years	$25,000,000
5/30	Enron Energy Services	Prudential Insurance of America	Energy Management	21	10 years	-$- -$-
5/31	DukeSolutions	Boeing	Facility Management		20 years	$1,000,000,000
5/31	Enron Energy Services	Quebecor World	Electricity, Natural Gas, Energy Management	60	10 years	

None of the firms listed in the table existed before 1996. Although it can be argued that much of the work represents new activity, it is unassailable that these projects would have gone to unaffiliated firms but for the entry of utility affiliated operations since, with but a few exceptions, only unaffiliated firms existed prior to the advent of deregulation.

This is not to say that the existence of new market entrants is harmful. On the contrary, increased entry into the market is both beneficial for consumers and necessary for competitive forces to function. Nor does the evidence prove the existence of impermissible acts, such as cross-subsidization, cost shifting, or discriminatory treatment. However, the share of work captured and the rapidity in which it was acquired (as a whole and by individual firms) stands in sharp contrast to the history of an industry characterized by numerous small firms, the majority of which have yet to attain comparable scope or size despite decades of existence. The quick success in capturing such a substantial market share by utility affiliated firms should be a cause of concern for the Commission and state regulators as to whether such success is the result of economies of scale or whether it is the result of impermissible and unfair competition. Even if such activity is the result of true efficiencies, NAFC believes that the fundamental, if not sole, reason for their existence lies in affiliation with a regulated monopoly and that only by extending the regulatory coverage of codes to utility affiliates, regardless of the type of competitive markets in which they operate, can there be an assurance that such operations are not based on anticompetitive conduct.

Neither is such behavior necessarily predicated on predatory pricing. The National Regulatory Research Institute (NRRI) has published a paper which comments on the behavior of utilities and their affiliates in a mixed market (i.e., regulated and unregulated) environment. The study concludes that:

> "...cross-subsidization from an upstream regulated market to a downstream unregulated competitive market is consistent with parent company profit maximization and not necessarily motivated by predatory pricing." [2]

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[2] . J. Abel, *Occasional Paper # 22, An Economic Analysis of Marketing Affiliates in a Deregulated Electric Power Industry,* NRRI, February 1998.

That such conduct is notoriously difficult to detect is the subject of many studies. This will be especially true where the affiliate in question might lie outside the scope of any code of conduct which would subject utility-affiliate transactions to greater scrutiny and where, should alternative rate making theories, such as Performance Based Ratemaking (PBR) be implemented. Such approaches permit only infrequent examination of rates for possible subsidies.

Where subsidized competition is the source of any alleged unfair or anti-competitive conduct, traditional antitrust analyses, which tend to focus on market share or barriers to entry are not especially useful. The elements for establishing a predatory pricing scheme (which might appear analogous since they involve a subsidy) are, as noted above, lacking in many instances because prices do not need to be raised to reap the benefits of driving off the competition. Market power abuse, in a traditional sense, may also be difficult to detect. Where subsidized competition is involved, the ability of the utility affiliate to dictate price is not predicated upon its size or share in the relevant market; rather, it is predicated on its access to its regulated utility affiliate. It is this preferential treatment as an affiliated entity which is the source of the unfair competition, not size or number of firms in the affected market.

It is the potential existence of a subsidy or other impermissible action which invokes the jurisdiction and commends inclusion under any code or standard. The unfairness of such subsidies compels a remedy for ratepayers, shareholders, and competitors alike. There is no compelling reason why state or federal regulatory authorities should prefer to act proscriptively to forestall potential cross-subsidization or cost shifting with respect to certain affiliates while tolerating impermissible actions with respect to other affiliates.

The potential for abuses and economic harm arising from cross-subsidization or cost shifting does not disappear merely because a utility affiliate is engaged in an enterprise other than retail sales of power. Nor, as the Commission has observed on many occasions, do behavioral rules in and of themselves suffice to curtail the potential for abuse. Further, and in many instances, states have chosen to limit even behavioral rules in this context, relying solely on transfer pricing methodology to curb cross-subsidization or cost shifting as it impacts related energy service markets. [3] Several states offer no coverage within their rules at all.

The issue of scope of coverage was recently debated in Michigan. Despite the fact that several Michigan legislators who were primarily responsible for that State's restructuring measure informed the state commission that the statute's intention was to include coverage for all utility affiliates, it took an extended and contentious proceeding before the MPUC issued a rule which extended coverage of its code provisions to affiliates engaged in competition with non-affiliated providers of energy related services, such as electrical and mechanical contracting.

Despite the fact that incumbent utilities argued that the Michigan code of conduct could not reach home heating services, appliance repair services, or fiber optic installation services and that none of the purposes of the statute described functions other than those respecting retail open access services, the Commission concluded, from the language of the statute, that the Legislature intended the code of conduct to apply beyond activities in the retail open access market.

> " The language of subsection 10a(4) is broad in declaring that the code of conduct shall prevent subsidization, information sharing, and preferential treatment "between a utility's regulated and unregulated services. The Commission does not view it as an oversight that the Legislature did not say 'between a utility's regulated electric services and retail open access services.' In addition, the issue of the scope of the code was before the Legislature. In that context, the use of expansive language about the scope of the code of conduct is a further indication that the Legislature did not intend to limit the scope to only retail open access." [4]

Unfortunately, Michigan's approach is not uniformly repeated in other states. Arkansas,

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[3]. Massachusetts is one such state which has so limited its code of conduct.

[4] Opinion and Order, In the Matter of the Approval of a Code of Conduct for Consumers Energy Co. and the Detroit Edison Co., MPSC Case No. U-12134, Dec. 4, 2000

Arizona, California, Maine, and Texas give have extended coverage to affiliates operating in markets beyond retail electric sales. However, Connecticut, Illinois, Massachusetts, New Mexico, and Delaware do not. Nevada has covered some activities beyond retail power operations but exempted others. Maryland has developed two codes; one for electric power marketing affiliates and one for affiliates engaged in other activities. New York did not develop a state code but proceeded on a utility-by-utility basis in effectuating settlements. Some states, such as West Virginia have yet to finalize their codes.

Such diversity in application clearly shows the need for a uniform approach or, at a minimum, a set of standardized guidelines. This is especially true of utility affiliates which seek regional or nationwide markets in the commercial and industrial areas, such as FirstEnergy's affiliate FirstEnergy Facility Management Services which operates in several states.

Economies of Scale

Secondly, NAFC believes that states need to conduct a more vigorous inquiry into assertions concerning economies of scope and scale. We agree with the Commission's assessment that "cognizable efficiencies" be adequately demonstrated to offset potential anticompetitive effects which may result from less than rigorous code requirements.

The Commission has clearly articulated the dilemma facing state regulators who are rightfully concerned about potential harm from cross-subsidization and cost shifting on one hand and the potential los of economic efficiency on the other.

The FTC's statement before the Massachusetts Department of Transportation and Energy is illustrative:

> "The potential benefits to consumers from preventing discriminatory transactions and cross-subsidization between regulated distribution utilities and their unregulated affiliates can take several forms. First, discrimination and cross-subsidization may artificially increase the costs of the regulated utility as

> costs incurred for the benefit of the affiliate are shifted to the regulated firm. Under a rate-of-return regulatory regime, higher costs will result in increased prices in the regulated market. Second, such conduct may increase costs in unregulated markets by displacing innovative, lower-cost suppliers and entrants with a higher-cost affiliate of the local regulated distribution utility. Third, this displacement also may eliminate or reduce the process and product innovations that the displaced firms would have provided to consumers.
>
> On the other hand, unbundling can impose costs on consumers in the form of lost economies of vertical integration and forgone economies of scale or scope. These lost economies translate into higher costs and higher prices in either the regulated or unregulated markets. In addition, participation by affiliates may in itself increase competition in relevant markets."[5]

Utilities frequently assert that economies of scale or scope will exist which will benefit consumers and could be lost if to great a degree of separation or something other than incremental pricing is imposed in a state's code. Regrettably, while such assertions are typical, little evidence has been offered in state proceedings to indicate that such efficiencies truly exist or that they will be shared with consumers.

Utilities invariably argue that they should be permitted to freely share employees, equipment, tools, and other assets, including good will, between regulated and unregulated operations and thereby capture these so-called economies of scope. While it is possible that there may exist some situations in which true economies of scope may exist, it is more likely that impermissible cost shifting and cross-subsidization will be the outcome where regulated assets are shared with unregulated operations.

Since the prices which can be charged in the unregulated market are subject to the forces of competition, there will be resistance to any attempt to charge more for the unregulated product or service. Thus, a utility will have every incentive to attribute all of any such common costs to

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[5] Comment of the Staff of the Bureau of Economics of the Federal Trade Commission Before the Commonwealth of Massachusetts Department of Telecommunications and Energy Order on Standards of Conduct, DTE 97-96, October 8, 1998

the regulated monopoly operations where they can be borne by ratepayers. This will unnecessarily raise rates to captive customers. Transferring such costs to the regulated market would represent impermissible cost shifting.

Requiring ratepayers to pay more than they should if costs were shared on an equitable basis, such action is violative of a regulated monopoly's obligation to maximize the value of their assets for the benefit of ratepayers. Inasmuch as ratepayer funds helped to build any value above cost that the regulated company's products, services or assets might have, such value should be returned to ratepayers whenever those assets, products or services are transferred to or used by the unregulated affiliate. This would serve to keep rates lower and simultaneously protect competition.

Moreover, because the only way in which economies of scope can be created is to permit the unregulated entity to have recourse to the assets of the regulated entity, the existence of true economies of scope may prove to be elusive. Because the greatest opportunity to create economies of scope will lie where the inputs of management, labor and equipment are most similar to the provision of both the regulated and unregulated products or services, it will, consequently, be more difficult for regulators to detect improper cost shifting and cross-subsidization. Thus, efforts to capture economies of scope will lead regulated utility monopolies to direct their entry into those very markets where the ability of regulators to determine that costs alleged to have been incurred in the provision of the regulated product or service were actually incurred to provide it. This difficulty in maintaining effective oversight will encourage not economies of scope, but anticompetitive and unfair cross-subsidization and cost shifting.

Instead or achieving market efficiencies, the entry of unregulated utility affiliates into energy related markets could generate inefficiencies. As observed by one commentator:

> "By writing off the costs of its competitive services against the regulated sector, the regulated firm faces lower costs of supplying

> competitive markets. This may result in an increase in its share of the competitive market over what it would have been had the costs not been misallocated. At the margin, this may result in the displacement of more efficient capacity of unaffiliated firms by less efficient capacity of the regulated firm. In the extreme, more efficient suppliers of the competitive product may be excluded altogether. This ability arises not from the regulated firm's efficiencies, but because its costs may be borne by customers of its regulated product through cost misallocation. Moreover, the regulated firm may have a particular incentive to capture an inefficiently large share of the unregulated market, if doing so would add to the pool of costs that could be misallocated to its regulated sector." [6]

Furthermore, misallocation or cost shifting sends the wrong signals to investors who might mistakenly perceive the unregulated venture to be more profitable than it really is.

The issue of economies of scope was raised in the state of California. Recognizing that there is no assurance that the benefits of such economies, should the exist, would rebound to the betterment consumers, the California Energy Commission (CEC) submitted comments in connection with the adoption of the separation standards in that state. Like the FTC, the CEC advised the CPUC to consider the inevitable tension between allowing the benefits of economies of scope which result from affiliation and the benefits of market competition and observed that electric utility restructuring was undertaken on the assumption that the benefits of market competition would outweigh the foregone benefits of scale and scope that were inherent in regulated utilities. The CEC concluded that limitations on utility and affiliate transactions were necessary to create a level playing field which would produce greater market efficiencies. The CPUC agreed.

"We agree with the CEC. ... it is not clear that the near-term savings that result,

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[6] T. Brennan, *Why Regulated Firms Should Be Kept Out of Unregulated Markets: Understanding Divestiture in United States v. AT&T.*, 32 Antitrust Bulletin 741, at 760.(1987).

> for example, from joint utility and affiliate procurement, would actually translate into lower prices for consumers or ratepayers. ... A firm which has a singular competitive advantage, for whatever reason, may retain extraordinary profits for some period rather than pass them through in the form of lower prices. Or, if an affiliate's costs are lower than other market participants or potential entrants, it could use this cost difference to undercut bids to drive out incumbents or to prevent other potential competitors' entry. ... The consumer interests we seek to protect go hand in hand with promoting competition. For example, we wish to prevent cross-subsidization, so that a utility's customers will not subsidize the affiliate's operation. This is especially important in our transition to a competitive market, since such leveraging, together with a utility's market power could inefficiently skew the market to the detriment of other potential entrants."[7]

It is precisely because such economies may prove to be illusory that NAFC believes that state regulators should demand something more than mere assertions as to their existence before deferring to utility interests in setting transfer pricing rules and other elements of their codes of conduct. The Commission's suggestion that cognizable efficiencies be demonstrated is the correct approach.

Valuations in Affiliate Transactions

Arguments concerning economies of scale or scope frequently arise in the context of establishing rules governing affiliate transactions and with regard to setting transfer pricing rules.

NAFC believes that the proper rule regarding transactions between an affiliate and its utility should be that of asymmetrical transfer pricing. Such a rule protects both ratepayers and

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7. Opinion Adopting Standards of Conduct Governing Relationships Between Utilities and Their Affiliates, CPUC Decision 97-12-088, December 16, 1997

competition in that it requires the higher of market or fully allocated (or fully distributed) costs to be applied when such assets or services are supplied by the regulated utility to it affiliate while requiring that the lower of market or FDC be charged for transfers from the affiliate to the utility.

A number of states have adopted the approach of using market value, including Arizona, Arkansas, California, Nevada, and Texas.

For consumers and competition alike, use of market value, with respect to transfers from a utility to its affiliates, is important. In a regulated monopoly setting, customers have created much of the value enjoyed by the regulated utility. If some of this value is being sold, leased, provided, or otherwise transferred, the utility has a obligation to maximize the return on those assets (or services) on behalf of the utility and its captive ratepayers. If, through the mechanism of stranded cost recovery, ratepayers are required to compensate utilities for the recovery of what are now shown to be uneconomic investments (e.g., generating plants) , they should be entitled to a return on those investments which now prove to have an enhanced value in a competitive setting. This should extend to assets beyond just physical plant facilities. Rights and licenses, professional expertise, intangible assets (such as goodwill) may also have an enhanced value and the full market price for transfers of such assets should be the measure of recovery.

NAFC is particularly concerned with two specific areas in this regard: the professional expertise developed by the utility and its personnel and the collective intangible assets of the utility. All professional and skilled labor have a market value which may exceed the costs of payroll and associated overhead charges. Frequently, utilities provide skilled labor to their unregulated affiliates for the purpose of performing work secured by the unregulated affiliate in the competitive market. In other instances, attorneys, accountants, public relations and advertising staff may be made available to perform functions on behalf of unregulated affiliates. To the extent that the full value of such services are not recovered, the unregulated affiliate recipient of favorable treatment which is both discriminatory and subsidized. It is unlikely that a utility would offer such services to another unaffiliated company at such actinically low rates.

NAFC can see no reason why ratepayers should accept, or regulatory bodies permit, a lower rate of recovery for the use of such assets when provided to an affiliated entity than that which could be had through an arms-length transaction with an unaffiliated firm.

A second area of concern arises in connection with certain intangibles, such as the financial strength and stability of the regulated utility which may be used to support unregulated start-up ventures. This may result in artificially lower costs of borrowing and credit for the unregulated venture. In circumstances where the unregulated company borrows with recourse financing the utility is providing and insured debt premium. The value of such a premium can be calculated and should be recovered by the utility . [8]

In Maine, the Commission rejected claims by the Edison Electric Institute (EEI) , an organization representing investor owned utilities, that pure economic efficiency required the transfer of goods and services from the utility to the affiliate at incremental costs. EEI also argued that the price set for asset sharing would also tend to favor incremental costs for goods that the affiliate could procure in competitive markets, and to impose fully distributed pricing would mean that the transaction would not take place. Further EEI stated that in order to preserve the opportunity for ratepayers to share in the economies of scope, the utility should be allowed to negotiate transfer prices between the market price and the fully distributed cost, regardless of which is higher, otherwise the transaction would not take place.

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[8] Raising capital through such arrangements can be a source of a cross-subsidy and regulators may have a difficult time distinguishing whether the borrowing was done for the regulated product or service or another product or service. The regulated firms may be better able to raise funds for operations in unregulated markets by borrowing against the assets of the regulated business. Because the utility is an established firm while the unregulated affiliate is most likely a start-up and because of its status as a regulated utility with a guaranteed return, the risk inherent in a regulated market is lower than it would be for the unregulated market. This can result in subsidized lower-cost debt for the unregulated operation. The "subsidy" will be paid by increases in the risk of capital borrowed to pay for the regulated service because that capital now bears some of the same risk of the unregulated service.

Such situations are more likely to arise where functional separation is employed rather than operational separation with the requirement that distinct legal identities be established for affiliated ventures operating in the competitive market.

As a real-world example, energy related service companies affiliated with a utility frequently tout their ability to finance a project out of the savings in energy costs which can be anticipated to result from the replacement of inefficient or outdated equipment with newer, more efficient products and systems. The ability to carry the costs of a project in such fashion requires very deep pockets and only the largest of unaffiliated competitors can hope to match this capability. Typically, a company would have to have substantial accumulated reserves, a significant cash flow, or the ability to borrow at favorable terms. For newly created and smaller firms, these attributes are usually lacking.

However, newly created energy service companies affiliated with a utility may enjoy preferential access to capital as a direct result of their relationship with the utility. If the utility lends its credit rating to the affiliate or borrows on its behalf, a competitive advantage arises.

The Commission disagreed with this rationale and, with respect to valuing utility equipment, facilities, services and personnel used by an affiliate, stated:

> " We find this argument flawed in two respects. First, our role is not to encourage or discourage transactions between the utility and its affiliate. Our proper role is to ensure that such transactions occur in such a way that is equitable and that does not impose a burden on core ratepayers. Second, where the market price is higher than net book value, we question why the utility and its ratepayers should accept a price that is below the value it could obtain from the market. It is not clear why we would permit transactions between the utility and its affiliate in which the utility sells an asset for less than it could get by selling to an unaffiliated entity at the market price. Accounting for transactions at the market price provides the utility and its ratepayers with no less value than it would have been provided by a transaction with a non-affiliated entity. Similarly, accounting for transactions at the market value assesses no more cost against the affiliate than a transaction with a non-affiliated entity.
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> We conclude the market price is the correct price to use for all transactions between utilities and their affiliates. Therefore, our provisional rule requires that all transactions between a utility and its affiliates shall be accounted for at the market value if available. If, and only if, the market value cannot be determined must the utility use FDC *(fully distributed cost)* as a proxy for the market value." [9]

In rejecting the contention that such rules would serve to effectively bar transactions between utilities and affiliates, the Maine Commission noted that the Federal Communication Commission's long-standing requirements that telephone utilities use a fully distributed cost methodology did not appear to have eliminated or curtailed utilities' participation in non-core ventures.

The Maine Commission followed the same rationale with respect to valuing other assets

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[9] *Order Provisionally Adopting Rule and Statement of Factual and Policy Basis,* Maine PUC, Docket No. 97-886, February 18, 1998, at 20, 21.

transferred by the utility to its affiliates and required such assets to be transferred at the market value. [10]

The National Association of Regulatory Utility Commissioners (NARUC) has established guidelines for state utility commissions to use in grappling with the issue of proper cost allocations. Paralleling the concerns of the FTC and others, the NARUC guidelines seek to attain a balance between the prevention of cross-subsidization and the capture of economies of scope and scale. NARUC established four basic guidelines:

> "1 Generally, the price for services, products and the use of assets provided by a regulated entity to its non-regulated affiliates should be at the higher of fully allocated costs or prevailing market prices. Under appropriate circumstances, prices could be based on incremental cost, or other pricing mechanisms as determined by the regulator.
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> 2. Generally, the price for services, products and the use of assets provided by a non-regulated affiliate to a regulated affiliate should be at the lower of fully allocated cost or prevailing market prices. Under appropriate circumstances, prices could be based on incremental cost, or other pricing mechanisms as determined by the regulator.
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> 3. Generally, transfer of a capital asset from the utility to its non-regulated affiliate should be at the greater of prevailing market price or net book value, except as otherwise required by law or regulation. Generally, transfer of assets from an affiliate to the utility should be at the lower of prevailing market price or net book value, except as otherwise required by law or regulation. To determine prevailing market value, an appraisal should be required at certain value thresholds as determined by regulators.
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> 4. Entities should maintain all information underlying affiliate transactions with the affiliated utility for a minimum of three years, or as required by law or regulation." [11]

Another state which established rules regarding the non-regulated activities of gas and electric

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[10] Ibid, at 22-24.

[11] Guidelines for Cost Allocations and Affiliate Transactions, August, 1999; NARUC Staff Subcommittee On Accounts

services is Colorado. Although Colorado has not yet deregulated or restructured its utility industry, it has adopted cost allocation rules which require transfers involving services from a utility to a non-regulated affiliate to be priced at the higher of fully distributed costs (FDC) or the market price. In setting this formula, the Commission specifically rejected utility arguments that using market price would amount to a subsidy flowing from the affiliate to the utility and would be tantamount to confiscation of non-regulated business funds.

The Colorado rules provide, with respect to transfers from the utility to an unregulated division, subsidiary, or affiliate, that:

1. if the transaction involves a service provided by tariff, the terms of the transaction shall be, for the purpose of FDC analysis, the tariffed rate.
2. if the transaction involves a service that is not provided pursuant to a tariff, the terms of the transaction for purposes of an FDC study shall be the higher of the utility's fully distributed cost or market rate. The market rate shall be either (a) the rate charged by the utility if the utility sells a significant quantity of the service to unaffiliated persons, or (b) if the condition cannot be met in (a) the lowest rate charged by other persons in the market for a comparable service.
3. if the transaction involves an asset, the terms of the transaction for the purposes of an FDC study shall be the higher of net-book cost or market rate. [12]

Name and Logo Use

NAFC agrees with the Commission's assessments concerning and unregulated affiliate's use of its utility's name and logo.

An affiliate's use of the utility name/logo creates two special problems. First, potential customers of the affiliate may be deceived into assuming that there is a relationship between services of the utility and the affiliate that does not, and under the code of conduct cannot, exist. Second, utility ratepayers may cross-subsidize the affiliate because the utility makes

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[12] Attachment A, Decision No. C97-1068, October 15, 1998. Colorado Rules, 4 CCR 723-47; Docket No. 96R-096EG, at pp 6-7

valuable assets, its name, logo and therefore reputation, available without charge to the affiliate. Affiliate use of the utility brand implicitly confers information about product quality and is generally associated with goodwill, thereby lowering costs and increasing sales versus competitors. Additionally, it creates an entry barrier if the affiliate is not required to pay for the brand. For numerous reasons, a ban on the use of name and logo by a utility's affiliates may be the cleanest and least burdensome method to addressing concerns in this area.

NAFC is dubious about the efficacy of disclaimers. It is unlikely that any amount of customer education and required disclaimers can undo the security that many customers will associate with a name brand they recognize and from which they have received reasonable service over the years. We believe that no amount of disclosure can overcome the mis-impression given to consumers by an affiliate's use of its parent utility's name or logo in its advertising and promotional materials.

Further, since regulated utilities may be required to operate separately from their affiliates, the utility's reputation for reliability, experience and quality of service may have no relevance to the operation of the affiliate. When an affiliate uses the utility brand it does so to create the impression that its relationship with the parent utility is a relevant fact for consumers to consider when a provider of services such as electrical or mechanical contracting. If the relationship is not relevant, then it is misleading to consumers to refer to it in advertising and promotional materials.

NAFC also notes that a utility brand is not one which has been developed through rigorous competitive efforts. The information the brand conveys may not be accurate or relevant because the utility's reputation, as a result operating a regulated monopoly energy business, will not necessarily produce the same quality under unregulated, competitive market conditions and in completely different markets, such as energy services, which require different expertise. Consumers and competition could be harmed if an affiliate is able to obtain an economic advantage (through name and logo use) which allows it to capture a greater market share than it otherwise would have without providing real value in terms of price or service quality in exchange.

Because utility distribution services will remain a regulated monopoly, the need for utility advertising is extremely limited and the benefits of the use of the same name all accrue to the affiliate. Therefore, there is not really any economy of scope. Utilities generally argue that ratepayers have not gained an interest in utility's name and logo merely by paying for regulated service over the years.

In lieu of a ban, as the Commission has suggested, requiring that the affiliate pay the parent for the right to use the logo represents an alternative approach to eliminate over-investing in reputation by the utility and a means by which to preserve competition. Because the logo is an asset, use of the logo by other firms, including affiliates, represents an asset transfer from the parent firm, and a state commission may wish to treat it like other asset transfers in order to avoid cross-subsidization. Some states, such as Maine have adopted such an approach and the commission in New York applied such a rule with respect to some telecommunications activity. In addition, despite the fact that a utility may own its name, ratepayers have served to build the value of name recognition over the years in which the utility was a monopoly. Thus, it seems only equitable that they should receive something in return for an asset which, in a competitive market can be of considerable worth and which could serve to lower rates.

This issue points to certain questions which may be unique in this context of deregulation. Namely, to what extent, and at what price, should a regulated entity which developed its name and reputation, economies of scale and scope, and expertise solely from its existence as a state sanctioned monopoly franchise be permitted to retain those advantages in the new deregulated environment or to transfer those advantages to unregulated affiliates which now seek to operate in a competitive market against other non-affiliated competitors. The issue of ownership of certain assets or whether they were previously included in the rate base may not be as important, from either a ratepayer or competition standpoint, than the value such assets have accrued as a result of their existing in a monopoly setting. If such regulated monopolies were created in order to benefit ratepayers, it would seem consistent to require at least some return to ratepayers of that value by which assets were enhanced due to the existence of the monopoly regardless of whether such assets were or were not preciously included in the rate base. It should be clear that goodwill is a utility asset, albeit an intangible one, and it should be treated no differently than other utility property. It should be noted that utilities generally take the position that ratepayers have an interest in the generating plants which the utilities' claim are liabilities with respect to determining stranded costs. It would not seem consistent to permit utilities to assert a contrary position with respect to assets such as goodwill. It is only fair that the ratepayers have an interest in intangible assets, such as name and logo, which have increased in value during the same regulatory period as generating assets.

These issues were most recently presented before the Maryland Public Utility Commission. Maryland had previously established its code of conduct but continued to revisit code issues after continued complaints about utility affiliate operations. In July, 2000 the Commission issued its latest ruling. With respect to the issue of Name and logo use, the MPUC held:

> "[T]he Commission finds that use of a utility's name or logo by an affiliate constitutes a transfer of a valuable asset from the utility to that affiliate. It is also clear that this valuable intangible asset is difficult to quantify, but valuable nonetheless, because of the power of the brand in the market and the related quality, reputation and accountability suggestions that are conveyed to consumers. Further, the Commission adopts the position of many of the parties that the transfer of the name and logo requires that some compensation is due to the utilities, and indirectly the ratepayers, for the affiliate's use of the assets, which value was built at ratepayers' expense. Not only does the name/logo have value that must be recognized, but the 'transfer' of this asset to an affiliate is anti-competitive because no other company would be permitted to use the asset without compensating the utility. Therefore, the Commission adopts, in principle, the concept of a royalty.
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> In addition, the Commission will apply this concept to other intangible or unquantified benefits, services, or assets being transferred from a regulated entity to growing numbers of affiliates. These decisions support an earlier decision herein, which finds

> the existing definition of utility asset to be too narrow and expands that definition to include intangible assets and unquantified assets." [12]

The State of Michigan's Commission also appears to have adopted this approach. In its December 4, 2000 decision approving a code of conduct, the Commission stated:

> "...to the extent that the utility's logo has value, the affiliate's use of the logo creates a duty to compensate the utility for its use." [14]

Uniformity of Regulation

The disparity of regulatory treatment between those states which have deregulated and those which have not, and the even greater variation among those states which have deregulated with respect to application and substance of codes, clearly creates a need for some kind of uniform regulation. NAFC believes that the Commission can fulfill an important role in establishing at least some minimum standards in this area. Indeed, given the present climate of skepticism concerning deregulation engendered by the California debacle, it may be that the Commission is the only regulatory authority which can effectuate such uniformity.

The expansion of utility and affiliated operations into multistate markets, especially in the area of energy and related energy services coupled with the disparity in codes of conduct creates a situation where firms in a state having more stringent codes may be at a distinct disadvantage when facing competition from firms operating from states with codes which are less than adequate in protecting consumers and competition. State codes of conduct generally apply to utilities and the affiliates of those utilities which are franchised within that particular state and fall under that jurisdiction of that state's regulatory authority. While states may require competitive energy providers to obtain licenses to sell electric power within each state in which they operate and, as a requirement of obtaining such license, conform to the rules established by the state regulatory authority, no such requirement exists for out-of-state utility affiliates operating in related energy service fields.

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13. Re: the Investigation into Affiliated Activities, Promotional Practices and Codes of Conduct Of Regulated Gas and Electric Companies, Md. Pub. Serv. Comm'n Order No. 76292, Case No. 8820, July 1, 2000

14. Opinion and Order, In the Matter of the Approval of a Code of Conduct for Consumers Energy Co. and the Detroit Edison Co., MPSC Case No. U -12134, Dec. 4, 2000, p. 15

Both affiliated and non-affiliated energy service firms in a state which has encompassed all utility affiliates within the application of its code, and which imposes asymmetrical transfer pricing based on market value (such as Michigan) or which has determined to impose a royalty on affiliate use of a utility's name and logo (such as Maryland), will be at a disadvantage when competing against the affiliated ventures of a utility which operates in a state that has not adopted such rules and the potential for subsidization and cost shifting are greater.

In addition, the question exists regarding the existence of an adequate forum in which aggrieved consumers and competitors may press their complaints. It is unclear whether any particular state regulatory commission would entertain a complaint about the anticompetitive practices of an out-of-state utility or its affiliated company or whether an out-of-state consumer or competitor would be heard by the state commission having jurisdiction over the utility and its affiliate. Further, even if such a state regulatory commission would entertain a compliant from an out-of-state competitor or consumer, it could only apply its own rules which may be less effective than those of the state in which the competitor or consumer resides.

It is also unclear whether an unregulated venture affiliated with a utility under the jurisdiction of a state commission, such as Maryland or Michigan, would have to operate under the stricter requirements of that state when engaging in activity in another state. Thus, a utility affiliate might be prohibited from using its name and logo without lengthy disclaimers in its home state while subject to less stringent rules, or none at all, in a neighboring state where the utility's name and reputation as a regulated entity may be well known.

Conclusion

NAFC restates its appreciation for the excellent efforts of the Commission to date. However, we believe that the Commission should go further and consider the adoption of rules which establish a remedy for the anticompetitive problems it has identified in connection with deregulation and restructuring in the electric power industry.

Specifically, NAFC believes that:

- impermissible cost shifting and cross-subsidization, along with the discriminatory dissemination of customer information to unregulated affiliates, should be recognized as unfair trade practices in and of themselves,
- the use of anything less than the recovery of fair market value, where it can be determined, for assets (including intangible assets) and services provided by a utility to its unregulated affiliates represents an impermissible subsidy,
- the Commission should develop procedures whereby consumers and competitors might file complaints regarding anticompetitive and anticonsumer abuses resulting from the interstate operation of utilities and their affiliates, and
- the Commission should consider how a degree of uniformity might be established with respect to the present disparate regulatory treatment concerning utilities and their affiliates.

Respectfully Submitted for NAFC

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